IN THE FIJI COURT OF APPEAL

Civil Appeal No. 51 of 1985

Between:

JAI CHAND & OTHERS — Appellants

and

1. JITENDRA PRASAD
2. MOHAN R.K. PRASAD & COMPANY LIMITED — Respondents

Mr. R. Kapadia & Mr. R. Chand for the Appellants
Mr. J. Singh for the Respondents

Date of Hearing: 2nd July, 1986

Delivery of Judgment: 18.7.86

JUDGMENT OF THE COURT

This is an appeal from a decision of Kermode J. dismissing the appellant's claim for damages resulting from a collision between his van and a truck driven by the first respondent.

The collision occurred on 17th February, 1983 on Kuku Road which runs from Nausori to Bau Island. On 18th the first respondent pleaded guilty in the Magistrate's Court, Nausori, to a charge of careless driving and was convicted of that offence. The proceedings for damages were commenced on 29th March, 1984 and the hearing took place on 27th February, 1985.

Paragraph (6) of the statement pleaded the fact of conviction and placed reliance on it to prove negligence.

The defence denied the allegation altogether but at the trial the respondent's counsel sought an amendment which was granted without objection. In the record occurs :-

> "Mr Sweetman: I now admit paragraph 6, conviction and fine but nothing else."

Both parties thereafter adduced evidence the appellant and the respondent giving entirely different versions of how the accident had occurred. The learned Judge, on a balance of probabilities, accepted the respondent's version, found him not to have been negligent and dismissed the appellant's claim.

The appellant's grounds can conveniently be grouped together under two heads: those dealing with the learned Judge's approach to, and treatment of, the respondent's conviction under section 9 of the Evidence Act; and those dealing with his evaluation of evidence and inferences drawn from it.

The appellant's first contention is that there was failure by respondent to plead that the conviction was "erroneous" and that he should not therefore have been allowed to lead evidence to that effect. We see no such failure. The amendment sought at the trial may not have been an immaculate piece of pleading but it was sufficient to put the appellant on notice that the fact of conviction was admitted; not the negligence.

The main thrust of the appellant's argument is directed towards showing the learned Judge's error in assessing the effect of section 9 of the Evidence Act on onus of proof and on the weight to be attached to the conviction put in evidence thereunder. His submissions are based largely on Lord Denning's judgment in Stupple v. Royal Insurance Ltd. (1971 1 Q.B. 50).

Section 9 in Fiji reads :-

"9.-(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in Fiji shall, subject to subsection (3), be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings:

Provided that, for the avoidance of doubt, it is hereby declared that no conviction which has subsequently been quashed or in respect of which a pardon has been granted or which for any other reason has lapsed or is deemed no longer to be a conviction, shall be a conviction for the purposes of this section and section 10.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in Fiji -

(a) he shall be taken to have committed that offence unless the contrary is proved; "

Phipson on evidence 13th (Edition) says that the equivalent English provision has caused some difficulty in practice and refers to the Court of Appeal decision in Stupple v. Royal Insurance. We think the difficulty is resolved by taking the plain words of section 9(2). Let us look at it in the context of a negligent driving action. Where a person (usually the defendant or someone for whom he is liable, or the plaintiff on a contributory negligence issue) is proved to have been convicted "he shall be taken to have committed that offence unless the contrary is proved".

Put in context the plaintiff alleges the defendant's driving was negligent. Ordinarily he has the onus of proving that fact but if he proves the conviction he proves

that the defendant was guilty of driving carelessly (and hence negligently). He may rest his case at that or he may call other evidence. Whichever way it happens the defendant will be held to have been negligent unless and until he proves, by whatever means he can, and on a balance of probabilities, that he was not negligent.

He does not attack the fact of conviction. He does not attempt to have greater or less weight given to it. It has no weight in the sense that one examines the standing of the Court which convicted him - whether it was a Magistrate's Court or the Supreme Court or the strength of the evidence there. To this extent and with the greatest respect we question the observation of Denning M.R. in Stupple v. Royal Insurance at p. 73 when he said :

> "Just as he (the Judge in civil action) has to evaluate the oral evidence of a witness, so he should evaluate the probative force of a conviction."

With great respect we suggest it does not have probative force - it has procedural effect - viz. of itself it establishes pro tem, and without more, that the convicted person was careless (and therefore negligent) unless and until by evidence he proves on balance that he was not. In so doing he need not traverse the merits of the previous prosecution to show what weight should be attached to it.

In support of this view we draw attention to the discussion of the equivalent English provision (The Civil Evidence Act 1968 Section 11) in Cross on Evidence (6th Edition) at pp. 99 - 100 :-

> " The Court of Appeal upheld the judgment for the defendants. Lord DENNING said :
>
> " I think the the conviction does not merely shift the burden of proof. It is a weighty piece of evidence of itself.

> For instance, if a man is convicted of careless driving on the evidence of a witness, but that witness dies before the civil action is heard (as in Hollington v. Hewthorn & Co., Ltd.) then the conviction itself tells in the scale in the civil action. It speaks as clearly as the witness would have done, had he lived. It does not merely reverse the burden of proof. If that was all it did, the defendant might well give his own evidence, negativing want of care and say: 'I have discharged the burden. I have given my evidence and it has not been contradicted.' In answer to the defendant's evidence the plaintiff can say: 'But your evidence is contradicted by the conviction.' "

BUCKLEY, L.J. said :

> " In my judgment, proof of conviction under this section gives rise to the statutory presumption laid down in s.11(2)(a) which, like any other presumption, will give way to evidence establishing the contrary on the balance of probability without itself affording any evidential weight to be taken into account in determining whether that onus has been discharged."

It is submitted that the approach of BUCKLEY, L.J., is to be preferred. The assessment of the weight of the conviction would be an impossibly difficult task. As BUCKLEY, L.J., pointed out, the propriety of the conviction is irrelevant in the civil action, the plaintiff would not discharge the onus cast upon him by s.11(2)(a) by proving that every witness who had given evidence against him at the criminal trial was guilty of perjury. He has to adduce sufficient evidence to satisfy the civil court that he was not negligent and, in spite of Lord DENNING's suggestion to the contrary, his own testimony without more will generally not suffice."

The civil Court should not concern itself with the evidence before the criminal Court. At p. 76 Buckley L.J. :

> "But the judge's duty in the civil proceedings is still to decide that case on the evidence adduced to him. He is not concerned with the evidence in the criminal proceedings except so far as it is reproduced in the evidence called before him, or is made evidence in the civil proceedings under the Civil Evidence Act, 1968, section 2, or is established before him in cross-examination. He is not concerned with the propriety of the conviction except so far as his view of the evidence before him may lead him incidentally to the conclusion that the conviction was justified or is open to criticism: but even if it does so, this must be a consequence of his decision and cannot be a reason for it. The propriety or otherwise of the conviction is irrelevant to the steps leading to his decision."

To this we would add one exception. If the conviction was on a plea of guilty, that amounts to a confession of responsibility for the conduct in question - just as would proof that after an accident the defendant had admitted in front of a witness that it had been his fault. He would need to explain why he made the admission. Saving that exception in our view the matter is as expressed by Buckley L.J. Interestingly enough, in Wauchope v. Mordecai (1970) 1 All E.R. at 419 Lord Denning was content, in a civil motor case, to say simply that the effect of the section was to reverse the onus of proof and placed upon the defendant the burden of proving he was not negligent.

Nor do we think that such a case becomes a two stage affair - first an enquiry, with the onus on the defendant, as to the correctness of the conviction followed by a shifting of the onus back onto the plaintiff to prove his claim. The fact of conviction remains, so the presumption of doing the act alleged remains until, on the whole of the evidence the civil court is persuaded otherwise.

We reject, therefore, the submission that the learned Judge erred in not treating the conviction as a weighty piece of evidence. We, however, agree that he was in error when despite his acceptance of the respondent's explanation for his plea of guilty, he stated -

> "The onus is on Chand (appellant) to establish that the first defendant did drive in a negligent manner",

and will deal with the effect of this misdirection later in the judgment.

We now turn to the evidence. The first appellant Chand and his uncle Budhai gave evidence for the appellants and Prasad the driver of the truck was the sole witness for the respondents. In addition, the first appellant produced some photographs of his damaged vehicle taken three months after the accident and the respondent put in two photographs of the road showing the stretch on which the collision had occurred. A sketch-plan made of the scene of the collision by an insurance investigator for the respondents was quite properly ignored by the learned Judge. There was no other evidence.

According to Chand, he had come from the direction of Nausori and parked his van facing Bau across the road from Budhai's house a short distance past his driveway and was talking to Budhai who was standing inside his compound. A truck drove past him from behind and disappeared around a bend some distance in front. The respondent's truck then came around that bend towards him, went out of control and careered across the road at an angle colliding with his van. He said :-

> " Truck came at me diagnally across the road and hit my front right mudguard. Left hand front was not hit. Back mudguard of lorry hit my front mudguard and dragged me

> into position where I ended up. Front of truck hit me and back mudguard connected and dragged my van. Truck went left after hitting me and then went right."

The appellant's uncle Budhai supported this evidence viz. that the van was correctly parked at the edge of Kuku Road when the collision occurred and that for two or three chains before the impact the respondent's truck had started swerving from one side of the road to the other. The force of the collision, he said made the van pull over to his side of the road facing in the opposite direction.

The respondent admitted that he had, on his own plea, been convicted of careless driving but stated that he had so pleaded because the original charge of dangerous driving had been reduced to one of careless driving. He was unrepresented and took the police advice that a plea of guilty to the lesser charge would attract only a small fine without any risk to his driving licence. He denied that the collision had occurred in the manner described by the appellant. According to him the van, as he approached it, had suddenly begun to reverse across the road towards Budhai's driveway. He had tried to avoid it by swerving to the off-side but the left front of his truck had come into contact with the driver's side of the van close to the front. He said :-

> "I tried to save him went to my wrong side - saw children on back of van. I could not stop. I hit on driver's side of van in front mudguard near to light. My left front mudguard hit the van. Van swung around and I continued on off the right. I was travelling 60 km - not restricted area."

The central issue before the learned Judge therefore was the position of the van when it was hit. Was it stationary on its correct side or was it reversing across

the road? Due to inconsistencies in their oral evidence he could not place much reliance on the details given by any of the three witnesses. He said :-

> "With the doubts I have about the credibility of the parties who were involved in the collision and also Budhai, the only witness to the collision, I have only been able to come to a decision by examining facts which are not in dispute and admissions made by the parties."

One matter not in dispute was the position of the appellant's van after the collision: it had come to rest on Budhai's side of the road facing Nausori. There was also the admission from the appellant that the respondent's truck was moving to its off side at the time of the collision and its left front came into contact with the van. That is what the respondent himself alleged.

On this evidence the learned Judge found it more probable that the van was in motion reversing towards the driveway at the time of the collision. He considered it most unlikely that the van would have come to rest where it did if the truck had come diagonally across the road and collided with it from the front. He recognised that strange things did occur in accidents of this nature but concluded :-

> "The probability of it being moved from the left side of the road, which is a fairly wide road, to the other side is so remote as to not warrant further consideration."

Learned Counsel submits that the photographs showing the extent of damage to the van conclusively establish the truth of the version given by the appellant in that the damage shown, he says, could only have occurred if the collision had taken place in the manner described by him.

We do not agree. In fact the photographs show the damage from the impact extending from near the door on the driver's side all the way to the bumper, more likely to have been caused from the side than from the front.

All in all we do not consider this to be a case where the learned Judge's inferences as to fact should be interfered with by this court.

We accept Counsel's submission that, owing to the delay in the matter reaching a hearing, the evidence adduced before the court was unsatisfactory. Kuku Road was then being repaired and resurfaced but no evidence was available as to its condition at the point of collision. The two photographs showing the stretch of this road running along Budhai's house were taken long afterwards. Oral evidence as to distances was, to say the least, vague. The Judge's comments on the evidence generally show his awareness of the difficulty but, as we have said earlier, the central issue in the end became the position of the van at the time of the collision. Had the evidence remained evenly balanced the respondent would have failed, not because of the weight of the conviction as counsel for the appellant claims, but because of the failure by the respondent to discharge the onus placed upon him. The learned Judge, however, did not consider the evidence so evenly balanced. He said :-

> " I accept his explanation for his apparent admission of negligence implicit in a plea of guilty to careless driving. He has, however, proved to my satisfaction that he was not negligent at all and did not commit the offence of careless driving. Had the magistrate heard the same evidence as I did he would, in my view, have come to the conclusion that the prosecution had failed to prove commission of the offence beyond reasonable doubt. "

The comment contained in the last sentence was a consequence of, not a reason for, his decision. This would be particularly so in this case where no evidence had been led at the hearing of the traffic case.

We also find no substance in the ground alleging failure on the Judge's part to give proper consideration to the issue of contributory negligence. Once he had accepted the respondent's evidence as to the position of the two vehicles at the time of the collision there was hardly anything before him on which he could make such a finding in favour of the appellant.

We now come to the reference made earlier to learned Judge's error as to onus of proof. He concluded his judgment with the following statement :-

> " So far as the plaintiff is concerned he has failed to establish on the balance of probabilities, that the accident happened in the way he alleged.
>
> The plaintiffs' claim is dismissed with costs to the defendants. "

The learned Judge seems to have dealt with the case on the basis that section 9 of the Evidence Act placed the onus on the respondent merely to prove that he had not been guilty of careless driving without shifting the overall onus which would normally lie on the appellant to prove negligence on the part of the respondent. There he fell into error. It was, as we have said earlier, for the respondent to prove that he was not negligent and once that was done to the learned Judge's satisfaction nothing remained requiring proof.

He correctly stated the onus that lay on the respondent and found it fully discharged when he said :-

"He has, however, proved to my satisfaction that he was not negligent . ....."

The matter should have ended there.

We do not, therefore, think that the erroneous statement as to the onus of proof complained of by the appellant could conceivably have made any difference to the decision finally reached by the learned Judge.

The appeal is consequently dismissed with costs to be taxed in default of agreement.

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Vice President

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Judge of Appeal

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Judge of Appeal